IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

APPEAL NO.1068 OF 2005
IN
CHAMBER SUMMONS NO.1692 OF 2004
IN
SUIT NO.3757 OF 1998

Mr.Madhukar Venkatesh Ullal
of Mumbai Indian Inhabitant,
residing at Flat No.7, Saravana
Co-operative Housing Society Ltd.,
Phiroshah Mehta Road, Vile Parle,
(East), Mumbai- 400 057. .. Appellant
(Orig. Plaintiff)

v/s.

1. M/s.Anita Hermy D'Souza
of Mumbai Indian Inhabitant,
residing at A/15, 4th floor,
Park View, Kulup Wadi Lane,
Near National Park Gate,
Borivali (East), Mumbai-400066.

2. Mr.Allan Hermy D'souza
of Mumbai, Indian Inhabitant,
residing at A/15, 4th floor,
Park View, Kulup Wadi Lane,
Near National Park Gate,
Borivali (East), Mumbai-400066.

3. Mr.Evrad Hermy D'Souza
of Mumbai, Indian Inhabitant,
residing at House No.100, St.
Braz Road, Vile Parle (West),
Mumbai 400 056.

4. Ms.Mishal Hermy D'Souza,
of Mumbai, Indian Inhabitant,
residing at A/15, 4th floor,
Park View, Kulup Wadi Lane,

Near National Park Gate,
Borivali (East), Mumbai-400066.

5. Mr.Jerome John D'Souza
of Mumbai, Indian Inhabitant,
residing at House No.100, St.
Braz Road, Vile Parle (West),
Mumbai 400 056.

6.(a) Mr.Alan Michael Aloysious
Pereira of Mumbai, Indian
Inhabitant, residing at Flat
No.253/D-4, Sweet Home
Co-operative Housing Ltd.
Gorai-II, Borivali (West),
Mumbai- 4000 092.

6(b) Ms.Alice Maria Michael Aloysious
Pereira of Mumbai, Indian
Inhabitant, residing at Flat
No.253/D-4, Sweet Home
Co-operative Housing Ltd.
Gorai-II, Borivali (West),
Mumbai- 4000 092.

7. Ms.Irene John D'Souza
of Mumbai, Indian Inhabitant,
residing at House No.100, St.
Braz Road, Vile Parle (West),
Mumbai 400 056.

8. Mrs.Beatrice E. Misquitta,
of Mumbai, Indian Inhabitant,
residing at House No.20, Bajaj
Road, Behind Shreenath Apartment,
Vile Parle (West), Mumbai-400 056.

9. M/s.Zodiac Developer Pvt.Ltd.
A company registered under
Companies Act, 1956 and having
their office at 0-10, Bharat
Industrial Estate, T.J.Road,
Sewree, Mumbai-400 015.

10.Phul Kumar Kailash Thakur,
of Mumbai, Indian Inhabitant,

residing at Vittal Kutir,
Shradhanand Road, Vile Parle (East),
Mumbai-400 057.

11. Ram Singh Kailash Thakur
of Mumbai, Indian Inhabitant,
residing at Vittal Kutir,
Shradhanand Road, Vile Parle (East),
Mumbai- 400 057.

12. Chhotalal D. Kotia,
of Mumbai, Indian Inhabitant,
residing at Flat No.1, Shanti Vijay
Apartment, Ground Floor,
Azad Road, Vile Parle (East),
Mumbai- 400 057.

13. Mr.Chaganlal D. Kotia,
of Mumbai, Indian Inhabitant,
residing at Room No.9, Vasant
Niwas, Ground floor, Nehru Road,
Vile Parle (East), Mumbai-400 057.

14. Municipal Corporation for
Greater Mumbai, having their
office at Mahapalika Bhavan,
Mahapalika Marg, Mumbai-400 001.

15. Mrs.Asma Begum Shekh, of
Mumbai, Indian Inhabitant,
carrying on business in the name
and style of M/s.S.G.Enterprises,
having her office at 508, Navrattan,
69, P.D.Mello Road, Carnac Bunder,
Mumbai-400 009 and also at house
No.100, St.Braz Road, Vile Parle
(West), Mumbai- 400 056.

16. Mr.Jignesh Kirti Shah, of
Mumbai, Indian Inhabitant, carrying
on business in the nameand style
of M/s.S.G.Enterprises,having his
office at 508, Navrattan,69, P.D.Mello
Road, Carnac Bunder, Mumbai-400009.

17. Mr.Manilal Lalji Gala, of

Mumbai, Indian Inhabitant,
carrying on business in the name and style
of M/s.S.G.Enterprises, having his
office at 508, Navrattan, 69,
P.D. Mello Road, Carnac Bunder,
Mumbai- 400 009.

18. Smt.Aparna Bimal Gala of
Mumbai, Indian Inhabitant,
carrying on business in the name and style
of M/s.S.G.Enterprises, having her
office at 508, Navrattan, 69,
P.D. Mello Road, Carnac Bunder,
Mumbai- 400 009.

19. M/s.Marvellous Builders Pvt.Ltd.
A company duly incorporated under
the Provisions of the Companies Act,
1956 and having its registered
address at 162, Mittal Tower,
16th Floor, `A' Wing, Nariman Point,
Mumbai- 400 021.

20. Mr.Sayed Mustafa Hussaini,
Adult, Indian Inhabitant, having
his address at 7/92, Kardi Park,
Irla, Vile Parle (W),
Mumbai- 400 056

.. Respodents
(Orig.Defendants
Respondent Nos.1
to 15, org.Deft.Nos.
1 to 15, Respondent
Nos.16 to 18 are newly
added Defts., Respondent
Nos.19 is the original
Respondent, Respondent
No.20 if the original
applicant.)

Mr.Pankaj Kavli i/by Ms.U.M.Jhaveri for the appellant.

Mr.Tejas Vora i/by Mr.Bharat Joshi for the respondent No.20.

Mr.K.N.Gaikwad for the respondent No.14.

CORAM : R.M.LODHA AND
ANOOP V. MOHTA, JJ.

DATED : 23RD JANUARY, 2006

ORAL JUDGMENT (Per R.M.Lodha, J.)

By the order dated 13th April, 2005, the learned Chamber Judge granted the chamber summons taken out by Sayed Mustafa Hussaini for his impleadment in the suit for the declaration and other incidental reliefs. Aggrieved thereby, the plaintiff has come up in appeal under clause 15 of the Letters Patent.

2. The respondent No.2- newly added defendant has raised the objection about the maintainability of the appeal.

3. The question that falls for our determination is: is the appeal maintainable under Clause 15 of the Letters Patent.

4. Clause 15 of the Letters Patent reads thus-

> "15. Appeal to the High Court from Judges of the Court:- And we do further ordain that an appeal shall lie to the said High Court of Judicature at Bombay from the judgment (not being a judgment passed in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisionis of section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of, the said High Court or one Judge of any Divisional Court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything herein before provided an appeal shall lie to the said High Court from a Judgement of one Judge of the said High Court from a Judge of any Division Court, pursuant to section 108 of the Government of India Act, made on or after the first day of

> February one thousand nine hundred and twenty-nne in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgement declares that the case is fit one for appeal; but that the right of appeal from other judgements of Judge of the High Court or of such Division Court shall be to Us, Our heirs or successors in Our or Their Privy Council, as hereinafter provided."

5. The concept and purport of the word "judgment" used in clause 15 of the Letters Patent and also its scope and meaning has come up for consideration before the courts from time to time. We need not go into all these judgments as the Supreme Court in the case of Shah Babulal Khimji v. Jayaben D. Kania and another, AIR 1981 SC 1786, thoroughly scanned and analysed large number of precedents starting from Sonbai v. Ahmedbhai Habibhai, (1872) 9 Bom HCR 298, the Full Bench decision of this court upto the case of Shanti Kumar R. Canji v. Home Insurance Co. of New York, AIR 1974 SC 1719 and laid down the tests to determine as to when an order passed by the trial Judge of the High Court can be said to be a judgment within the meaning of clause 15 of the Letters Patent. In the exercise, the Supreme Court, besides its previous judgments, considered judgments of this court, Calcutta High Court, Madras High Court, Allahabad High Court, Lahore High Court, Rangoon High Court, Nagpur High Court, Andhra Pradesh High Court, Jammu & Kashmir High Court and the Privy Council.

6. The Supreme Court in Shah Babulal Khimji noticed that the

interpretation of the word “judgment” appearing in the Letters Patent has not been consistent or unanimous and there was serious divergence of judicial opinions and a constant conflict between the High Courts for more than a century. What amazes us is that even after the decision in Shah Babulal Khimji, the question continues to be raised about the maintainability of appeals from various orders passed by the trial Judge of the High Court. In the present case, the maintainability of the appeal is questioned in the appeal from an order relating to addition of party under Order 1 Rule 10 CPC.

7. The tests laid down in the leading case from Madras High Court in T.N.Tulijaram Row v. M.K.R.V.Alagappa Chettiar, (1912) ILR 35 Madras 1 were generally approved in Shah Babulal Khimji. In paragraph 90 of the report, the Supreme Court considered the tests spelt out by Sir Arnold White, C.J. In Tuljaram Row's case thus-

> “90. The next leading case which lays down the test of a `judgment' and which seems to have found favour with most of the High Courts in India is the test laid down by Sir Arnold White, C.J. In Tuljaram Row's case (1912 ILR 35 Mad 1) (supra) where the learned Chief Justice pointedly spelt out various tests and observed thus-
>
> > “The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards

obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent.

I think, too, an order on an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment, but with a view to rendering the judgment effective if obtained)- e.g., an order on an application for an interim injunction, or for the appointment of a receiver is a `judgment' within the meaning of the clause.""

8. In paragraph 91, the tests laid down by Sir Arnold white, C.J. were catalogued thus-

"91. .....

(1) It is not the form of adjudication which is to be seen but its actual effect on the suit or proceeding;

(2) If, irrespective of the form of the suit or proceeding, the order impugned puts an end to the suit or proceeding it doubtless amounts to a judgment;

(3) Similarly, the effect of the order, if not complied with, is to terminate the proceedings, the said order would amount to a judgment;

(4) Any order in an independent proceeding which is ancillary to the suit (not being a step towards judgment) but is designed to render the judgment effective can also be termed as judgment within the meaning of the Letters Patent;

So far as this test is concerned, the learned Chief Justice had in mind orders passed by the Trial Judge granting or refusing ad interim injunction or appointing or refusing to appoint a receiver.

(5) An order may be a judgment even if it does not affect the merits of the suit or proceedings or does not determine any rights in question raised in the suit or proceedings.

> (6) An adjudication based on a refusal to exercise discretion the effect of which is to dispose of the suit, so far as that particular adjudication is concerned, would certainly amount to a judgment within the meaning of the Letters Patent."

9. The Supreme Court in paragraph 92 referred to the test applied by Krishnaswami Ayyar, J. in Tuljaram Row's case but disagreed with him thus-

> "92. Similarly, Krishnaswami Ayyar, J., who agreed with the Chief Justice in the above case, pointed out that even an interlocutory judgment which determines some preliminary or subordinate point or plea or settles some step without adjudicating the ultimate right of the parties may amount to a judgment. With due respect we think that if the observations of Krishnaswamy Ayyar, J. are carried to its logical limit every interlocutory order would have to be held to be appealable."

10. Then in paragraph 93 of the report, the Supreme Court observed thus-

> "93. So far as the tests laid down by White, C.J., and as analysed by us, are concerned we are inclined to agree generally with these tests though we feel that some of the tests laid down are far too wide and may not be quite correct. While the view taken by Sir Rechand Couch, C.J. In Justice of the Peace for Calcutta (1872-8 Beng LR 433) (supra) is much too strict, the one taken by Sir White, C.J. Is much too wide. The correct test seems to lie somewhere in between the tests laid down by the aforesaid jurists."

11. In paragraph 107, the Supreme Court considered its earlier decision in the case of Shanti Kumar R. Canji v. Home insurance Co. of New York, AIR 1974 SC 1719 and noticed the said judgment in the following manner:-

"107. The last case of this Court to which our attention has been drawn is Shanti Kumar R. Canji v. Home Insurance Co. of New York, (1975) 1 SCR 550: (AIR 1974 SC 1719) where the court was considering the effect of an order passed by the trial Judge allowing amendment of the plaint and the question at issue was whether such an order would be a judgment within the meaning of the Letters Patent. The following observations were made by this Court in the aforesaid case (at p. 1722 of AIR):

"We are in agreement with the view expressed by the High Court at Calcutta in the M.B.Sirkar's case (AIR 1956 Cal 630) as to when an order on an application for amendment can become a judgment within the meaning of clause 15 of the Letters Patent. If an amendment merely allows the plaintiff to state a new cause of action or to ask a new relief or to include a new ground of relief all that happens is that it is possible for the plaintiff to raise further contentions in the suit, but it is not decided whether the contentions are right. Such an amendment does nothing more than regulate the procedure applicable to the suit. It does not decide any question which touches the merits of the controversy between the parties. Where, on the other hand, an amendment takes away from the defendant the defence of immunity from any liability by reason of limitation, it is a judgment within the meaning of clause 15 of the Letters Patent. The reason why it becomes a judgment is that it is a decision affecting the merits of the question between the parties by determining the right or liability based on limitation. It is the final decision as far as the trial Court is concerned.

In finding out whether the order is a judgment within the meaning of clause 15 of the Letters Patent it has to be found out that the order affects the merits of the action between the parties by determining some right or liability. The right or liability is to be found out by the court. The nature of the order will have to be examined in order to ascertain whether there has been a determination of any right or liability." (Emphasis ours). Thus, having noticed the ratio of some of the cases of this Court referred to above, regarding the tests to determine the import and meaning of the word `judgment' we now proceed to deal with the specific question after interpreting clause 15 of Letters Patent of the Bombay High Court and the corresponding clauses of Letters

> Patents of other High Courts. We shall endeavour to interpret the connotation and the import of the word `judgment' particularly in the light of pertinent and pointed observations made by this Court on earlier occasions as discussed above."

12. The Supreme Court in paragraph 113 of the report held that the word `judgment' should receive much wider and more liberal interpretation than the word `judgment' used in the Code of Civil Procedure. At the same time, it cannot be said that any order passed by the trial Judge would amount to a judgment; otherwise there will be no end to the number of orders which would be appealable under the Letters Patent. The Supreme Court while holding that the word `judgment' has a concept of finality in a broader and not a narrower sense, categorised the judgment in three types; (i) final judgment; (ii) preliminary judgment and (iii) intermediary or interlocutory judgment in the following manner:

> "(1) A final judgment- A judgment which decides all the questions or issues in controversy so far as the trial Judge is concerned and leaves, nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the trial Judge indisputably and unquestionably is a judgment within the meaning of the Letters Patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench.
>
> (2) A preliminary judgment- This kind of a judgment may take two forms- (a) where the trial Judge by an order dismisses the suit without going into the merits of the suit

but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the trial Judge would be a judgment finally deciding the cause so far as the trial Judge is concerned and, therefore, appealable to the larger Bench. ((b) Another shape which a preliminary judgment may take is that where the trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g., bar of jurisdictiion, res judicata, a manifest defect in the suit, absence of notice under Sec.80 and the like, and these objections are decided by the trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the trial Judge rejecting the objectiions doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to a larger Bench.

(3) Intermediary or interlocutory judgment- Most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of Order 43, Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders which are not covered by Order 43, Rule 1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote."

13. Apart from the tests laid down by Sir Arnold White, C.J., in Tuljaram Row's case and the said tests having been generally adopted and approved by the Supreme Court, in paragraph 119 of the report, the Supreme Court

observed that the following considerations must prevail with the court.

> "(1) That the trial Judge being a senior court with vast experience of various branches of law occupying a very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Thus, any discretion exercised or routine orders passed by the trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice one party or the other cannot be treated as a judgment otherwise the appellate court (Division Bench) will be flooded with appeals from all kinds of orders passed by the trial Judge. The courts must give sufficient allowance to the trial Judge and raise a presumption that any discretionary order which he passes must be presumed to be correct unless it is ex facie legally erroneous or causes grave and substantial injustice.
>
> (2) That the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the questions in controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings.
>
> (3) The tests laid down by Sir White, C.J. Is also by Sir Couch, C.J. As modified by later decisions of the Calcutta High Court itself which have been dealt with by us elaborately should be borne in mind."

14. In paragraph 120 of the report, the Apex Court gave illustration of interlocutory orders which may be treated as judgments. These interlocutory orders are:

> "120. .....
>
> (1) An order granting leave to amend the plaint by introducing a new cause of action which completely alters the nature of the suit and takes away a vested right of limitation or any other valuable right accrued to the defendant.
>
> (2) An order rejecting the plaint.

(3) An order refusing leave to defend the suit in an action under Order 37, Code of Civil Procedure.

(4) An order rescinding leave of the trial Judge granted by him under Cl.12 of the Letters Patent.

(5) An order deciding a preliminary objection to the maintainability of the suit on the ground of limitation, absence of notice under Section 80, bar against competency of the suit against the defendant even though the suit is kept alive.

(6) An order rejecting an application for a judgment on admission under O.12 Rule 6.

(7) An order refusing to add necessary parties in a suit under Section 92 of the Code of Civil Procedure.

(8) An order varying or amending a decree.

(9) An order refusing leave to sue in forma pauperis.

(10) An order granting review.

(11) An order allowing withdrawal of the suit with liberty to file a fresh one.

(12) An order holding that the defendants are not agriculturists within the meaning of the special law.

(13) An order staying or refusing to stay a suit under Section 10 of the Code of Civil Procedure.

(14) An order granting or refusing to stay execution of the decree.

(15) An order deciding payment of court-fees against the plaintiff.

15. As has been observed by the Supreme Court itself, the interlocutory orders referred to in paragraph 120 are only illustrative and not exhaustive but give sufficient guidelines as

to which order passed by the trial court amounts to judgment within the meaning of Letters Patent.

16. An order allowing an impleadment of a party under Order 1 Rule 10(2) CPC in the suit does not find place in the illustrations given by the Supreme Court in paragraph 120 of the Judgment in Shah Babulal Khimji.

17. We may notice here that the Division Bench of Madras High Court in the case of R.N.Selvam Mudaliar v. P.A.Raju Mudaliar, AIR 1953 Madras 816 held that an order adding a party to a suit instituted on the Original Side of the High Court is not a `judgment' within the meaning of clause 15 of Letters Patent and no appeal lies against such order. While holding so the Division Bench relied upon the tests laid down in Tuljaram Row and it was held thus:

> "2. At the outset, we must hold that the appeal is not maintainable. The order of the learned Judge cannot, in our opinion, be held to be a judgment within the meaning of Cl.15, Letters Patent. In- `Ramaswami Chettiar v. Kanniappa Mudaliar', AIR 1930 Mad 987 (A) it was held by Curgenven and Bhashyam Aiyangar JJ. That an order adding a party to a suit is not a judgment within the meaning of Cl.15 and therefore no appeal lay against such an order. At page 987, after referring to the test adumbrated in the Full Bench decision in - `Tuljaram Rao v. Alagappa Chetti' 35 Mad 1 (B), namely to see whether the order sought to be appealed puts an end to the suit or proceeding to any extent, Curgenven J. observed as follows:
>
> > "Judged by this test, I feel no difficulty in deciding that an order adding a party to a suit is not a judgment. It does not put an end to the suit, but is

> clearly a step towards a final adjudication. It settles no rights other than the right to be heard in the cause."
>
> Following this ruling, we must hold that the appeal is not maintainable."

18. In our view it is not necessary to deal with the decisions of various High Courts dealing with the question of maintainability of the appeal from the order of learned trial Judge adding a party before the decision of the Supreme Court in the case of Shah Babulal Khimji. However after Shah Babulal Khimji, the specific question about maintainability of appeal appears to have come up before Delhi High Court and Madras High Court.

19. The Division Bench of Delhi High Court in the case of Gurmauj Saran Baluja v. Mrs.Joyce C. Salim and others, AIR 1990 Delhi 13 considered the question of maintainability of appeal from an order under Order 1 Rule 10 allowing an addition of a party who was not party to the agreement in the suit for specific performance of the contract thus:

> "9. Only the intervener Kaka Singh has appeared to oppose the present appeal. He has raised a preliminary objection that the appeal is not maintainable under S.10 of the Delhi High Court Act 1966. Sub-s.(1) of S.10 which is relevant provides that where a single Judge of the High Court of Delhi exercises ordinary original civil jurisdiction, an appeal shall lie from the judgment of the single Judge to a Division Court of that High Court. The question that arises for consideration is if the impugned order is a `judgment' so as to be appealable. No advantage can be drawn from the provisions of O.43 of the Code, which provides for appeals from various orders, an order under O.1, R.10 of the Code not being one of the appealable orders. It has now been authoritatively held by the Supreme Court that as far as S.10 of the Delhi High Court Act 1966 is concerned, Order 43 of the Code is not

exhaustive. Though appeals from orders mentioned in O.43 would be maintainable, the reverse is not true. In Shah Bahulal Khimji v. Jayaben D. Kania AIR 1981 SC 1786, the Supreme Court was examining the scope, ambit and meaning of the word `judgment' appearing in Cl.15 of the Letters Patent of the Bombay High Court and the corresponding clauses in the Letters Patent of other High Courts. The court observed that the significance of the word `judgment' assumed a special importance in those High Courts which had ordinary civil jurisdiction depending on the valuation of the suit or the action and that those High Courts were Calcutta, Bombay, Madras as also Delhi and Jammu & Kashmir. The principles laid down by the Supreme Court can be gathered from paras 106 and 115 of the judgment and these are as under:-

"106. Thus, the only point which emerges from this decision is that Whenever a trial Judge decides a controversy which affects valuable rights of one of the parties, it must be treated to be a judgment within the meaning of the Letters Patent."

"115. Thus, in other words every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. Similarly, orders passed by the trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance on this score can be corrected by the appellate court in appeal against the final judgment."

In Jugal Kishore Paliwal v. S. Sat Jit Singh (1984) 1 SCC 358, the question before the Supreme Court was if an order allowing amendment of the written statement was appealable under S.10 of the Delhi High Court Act 1966. The Division Bench of this Court had held that the appeal was not maintainable. The Supreme Court held that the High Court was wrong in refusing to go into the merits of the case on the ground that the appeal was not maintainable. It referred to its decision in Shah Babulal Khimji's case (AIR 1981 SC 1786) (supra) wherein various parameters and conditions had been laid down under which an appeal could lie from a single Judge to the Division Bench. The Supreme Court further observed as

under:-

> "In the instant case as the amendment of the written statement was sought at the time of framing issues and it vitally affects the right of the parties and seeks to work some injustice to the plaintiff, it merits serious consideration by the appellate court on the question whether or not amendment should be allowed. It would certainly not be a purely interlocutory order against which no appeal before the LPA bench would be maintainable."
>
> Reference may also be made to a Bench decision of this court in Satish Chander Yadav v. Lt.Col.Gaj Singh Yadav (FAO(OS) No.55/85, decided on 13.8.1985). In this case an appeal was filed before the Division Bench against an order of the single Judge framing two issues described as preliminary issues. It was contended that the appeal was not competent. The court, however, observed that the order deciding to try the suit in a particular manner, after framing two preliminary issues and postponing the settlement of other issues, did amount to a judgment, and so it was appealable. In the present case the effect of the impugned order is that it enlarges the scope of the suit and directs the plaintiff to add a party against his wishes resulting in filing an amended plaint containing consequential amendments on the addition of a party. The addition of the party would also amount to a de novo trial as far as the party added is concerned. It cannot therefore, be said that the impugned order is not a judgment. It does affect vital and valuable right of the plaintiff and decides matters of moment. The plaintiff has complained that the order has worked serious injustice to him. We would, therefore, hold that the order is a `judgment' within the meaning of sub-s. (1) of S.10 of the Delhi High Court Act 1966 and is, therefore, appealable."

20. In the light of the facts obtaining therein, the Delhi High Court held that by impleadment of Kaka Singh who was not party to the agreement of which specific performance was sought in the suit, the scope of the suit would be enlarged. The Delhi High Court further observed that by directing the plaintiff to add a party against his wish would necessitate the

filing of amended plaint containing consequential amendments and that the addition of the party would also amount to de novo trial as far as the party added is concerned. The Delhi High Court, in the circumstances, held that the order of addition of party affects vital and valuable right of the plaintiff and decides matter of moment and therefore, a `judgment' an appealable.

21. On the other hand, the Division Bench of the Madras High Court in the case of A.S.Manavali Chettiar and others v. T.V.Selvarajan and others, (1993) 1 Law Weekly 127, held that the order impleading party in the suit is not a `judgment' and appeal therefrom is not maintainable. While holding so, the Madras High Court considered the judgment of the Supreme Court in the case of Shah Babulal Khimji, its previous judgment in the case of Ramaswami Chettiar and two other judgments. The judgment of the Delhi High Court in the case of Gurmauj Saran was also considered but not followed. The Madras High Court considered the question thus-

> "6. We may at this stage notice a preliminary objection raised by Mr.B.T.Seshadri, learned counsel for respondents 1 to 3 in these appeals. According to learned counsel, by the order appealed against, respondents 1 to 3 have merely been impleaded as parties to the suit C.S.No.153 of 1990, and the Application therein and there had been no adjudication of any rights of parties or even termination of proceedings, and as such, the order impleading respondents 1 to 3 would not ba a `judgment' within the meaning of clause 15 of Letters Patent. Reliance in this connection was placed by learned counsel upon the decisions reported in Ramaswami Chettiar v. Kanniappa Mudaliar and Selvam Mudaliar v. Raju Mudaliar. On the other hand, learned counsel for the appellant submitted, relying upon Gurumauj Saran v. Joyee C.Salim that the order impleading respondents 1 to 3, would be a `judgment' within the meaning of clause 15 of the Letters Patent and the appeals were, therefore,

competent.

7. In order to fall within the meaning of `judgment' under clause 15 of the Letters Patent, the order must contain the traits and trappings of finality either by deciding the questions in controversy in ancillary proceedings or in the suit itself or in a part of the proceedings and such an adjudication must also decide and affect the rights of parties. It has also to be borne in mind that every intermediary order cannot be regarded as `judgment' but only such orders deciding or affecting the rights of parties and putting an end to or terminating the proceedings, can be treated as `judgment'. Viewed in the light of the aforesaid well established principles, we are of the view that the order appealed against, would not fall under `judgment' within the meaning of clause 15 of the Letters Patent. The effect, rather than the form, of the adjudication has to be looked into, and if so done, the order appealed against is nothing but a step towards a final adjudication, in that, new parties are added without in any manner adjudicating upon or setting any substantive rights and could be properly called initiatory in character, in that, new parties are introduced into the arena of litigation in order to project their cause. Such an order does not at all put an end to the litigation or decide the rights of parties. It is true that even intermediary orders may sometimes fall within the expression `judgment' occurring in clause 15 of Letters Patent, but, in every case, the nature and effect of the order alone would be determinative of its character as a `judgment' for purposes of clause 15 of the Letters Patent. We have earlier pointed out that the effect of the orders appealed against is merely to bring Respondents 1 to 3 in these appeals within the arena of the suit in order that they8 may put forward their case that the institution in question is a public temple and not a denominational institution. That by no means can be regarded as an adjudication upon either the rights of the parties or even as regards the character of the institution. The order appealed against has also kept alive the suit and the other proceedings. Therefore, judged by the well laid down tests, the order appealed against cannot be regarded as a `judgment' within the meaning of clause 15 of the Letters Patent. We are also fortified in this view of ours by the decisions to which our attention has been drawn by learned counsel for respondents 1 to 3. In Ramaswami Chettiar v. Kannaiappa

Mudaliar, the question arose whether an order impleading certain parties to the suit instituted on the original side, would be a `judgment' within the meaning of clause 15 of the Letters Patent. Dealing with this question, the Division Bench pointed out that what must be looked into is the general nature and effect of the order, and judged by the tests of adjudication of rights and termination of proceedings, such an order would not be a `judgment' within the meaning of clause 15 of the Letters Patent. In considering the nature of the order for impleading parties to a suit, the court pointed out that such an order does not put an end to the suit, but would only be a step towards final adjudication and that there is no settlement of rights other than the right to be heard in the cause and its effect on the newly added parties would be to put them on the road towards adjudication without settling substantive rights. We are of the view that the principles laid down in this decision would be equally applicable here. In Selvam Mudaliar v. Raju Mudaliar Rajamannar, C.J., and Venkatarama Aiyar, J., considered whether an order allowing an application for addition of parties, would be a `judgment' within the meaning of clause 15 of Letters Patent. Referring to Ramaswami Chettiar v. Kanniappa Mudaliar and applying the ratio of that decision, the Bench took the view that the appeal was not maintainable. In our view, this decision would govern these appeals also. We may also usefully refer in this connection to the decision in Shanti Kumar v. V.H.Ins.Co. In that case, an application seeking an amendment of the plaint was allowed, but on appeal, that order was set aside. On further appeal to the Supreme Court it was contended that no appeal would lie under clause 15 of the Letters Patent against an order allowing an amendment of the plaint. In dealing with this question, the Supreme Court pointed out that in finding out whether any decision is a `judgment' within the meaning of clause 15 of the Letters Patent, each case must be looked into to ascertain whether there is a decision determining the rights or liabilities of the parties affecting the merits of the controversy and it also puts an end to the proceedings so far as the court dealing with it is concerned. However, on the facts of that case, the Supreme Court took the view that by reason of the operation of the law of limitation, the respondent had acquired an immunity from liability and that was sought to be taken away by the amendment and that had touched upon the merits of the question by determining the rights

or liabilities based on limitation and the decision was also final so far as the trial court was concerned. It is thus seen that the Supreme Court upheld the maintainability of the appeal on the basis of the order appealed against under clause 15 of the Letters Patent having determined the rights or liabilities of the parties based on limitation, having finality. Such consideration do not arise at all here. Again, in Sahah Babulal Khimji v. Jayaben, the Supreme Court, considered the question whether an order refusing to appoint a receiver or to grant interim injunction is appealable, under clause 15 of the Letters Patent. In a very elaborate judgment, referring to the entire case-law, the Supreme Court pointed out that the word `judgment' occurring in clause 15 of the Letters Patent, should receive a larger, wider and liberal interpretation than the word `judgment' used in the Code, but, at the same time, any order passed cannot be said to be a `judgment'. It was also pointed out by the court that a `judgment' could be of three kind viz., (1) Final judgment, (2) Preliminary judgment; and (3) Intermediary or interlocutory judgment. Obviously, in this case, there is no question of any final `judgment', because the suit or action brought by the appellant has neither been dismissed nor decreed either in part or in full. Nor can the order in this case, be regarded as a preliminary judgment affecting the rights of the appellant or the proceeding as a whole. If at all, the order appealed against, would fall only under the category intermediary or interlocutory judgment; but even then, the order must directly affect a valuable right of the appellant or decide an important aspect of the trial. The order appealed against, in this case, does neither. The Supreme Court also cataloged the instances of interlocutory or intermediary orders, which may be regarded as `judgment' and an order of the kind forming the subject matter of these appeals, is not one among them. However, the decision in Gurmauj Saran v. Joyee C.Salim proceeds to hold that an order impleading a party to the suit would be a `judgment' within the meaning of sub-S.(1) of S.10 of the Delhi High Court Act. That conclusion has been arrived at on the reasoning that addition of a party against the will of the plaintiff enlarges the scope of the suit and would amount to a de novo trial as far as the newly added party is concerned and therefore, it cannot be said that such an order is not a `judgment'. It had also been stated that vital and valuable rights of the plaintiff are affected.

> The impleading of new parties and the consequential amendment of the plaint on such addition and other related steps, as pointed out earlier, would all be purely procedural and initiatory and would not in any manner either decide the right of parties or determine the proceeding finally, in so far as the Court is concerned and under those circumstances, we are unable, with respect, to accept the reasoning that vital and valuable rights of the plaintiff are affected and therefore, the order would be a `judgment' within the meaning of clause 15 of the Letters Patent. Thus, on a due consideration of the nature of the order passed in Application Nos.1536 to 1538 of 1990, we are of the view that no right of the parties had in any manner been touched upon or adjudicated or settled and that the proceedings before the Court had also been left in tact and under these circumstances, the common order passed in the Applications cannot be regarded as `judgment' within the meaning of clause 15 of the Letters Patent. We, therefore, hold that the appeals are not maintainable and deserve to be dismissed."

22. In so far as an order of addition of parties is concerned, surely, it is not a final judgment. It is so because such order does not decide the questions or issues in controversy in the suit; it does not bring an end to suit or action. Such order is not preliminary judgment as well. By ordering addition of the party, the suit is not disposed of on a preliminary point. The debatable issue is whether the order of addition of party is interlocutory or intermediary judgment as categorised by the Supreme Court and hence appealable under clause 15 of Letters Patent. Our answer is in the negative. For one, such order does not possess the characteristics and trappings of finality in as much as it decides nothing and is only initiatory. The other it does not adversely affect a valuable right of the party directly nor decides an important aspect of the trial in an

ancillary proceeding. Such order is only procedural in nature. Ultimately nature and effect of the order would be determinative in holding whether such order is `judgment' within the meaning of clause 15 of the Letters Patent. Where trial Judge allows an impleadment of the party being either necessary or property party, what is ordered is the participation of the party in the suit who has not been impleaded by the plaintiff initially. By impleadment of that party neither important aspect of the trial nor ancillary proceedings is decided. Such order even directly does not affect the valuable right of the plaintiff. Merely because the plaintiff has to fight the case against a party unwillingly or that it may to some extent widen the controversy in the suit, that would not mean that his valuable right is directly affected. We find ourselves in agreement with the well considered opinion of the Madras High Court that by addition of a party rights of the parties in any manner are not decided nor the proceedings are determined finally. Where the trial Judge allows any impleadment of the party in a given case at best some right of the plaintiff would be affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote because the plaintiff has full right to contest the defence that would be set up by the added party and succeed in the suit. By such order, there is no determination of any right or liability nor does it take away substantial right of the plaintiff and, therefore, an order of addition of a party shall not fall within the meaning of the word `judgment' under clause 15 of the Letters Patent.

23. The question of impleadment of the party has to be decided on the touch stone of the Order 1 Rule 10 of the Code of Civil Procedure which provides that only a necessary or proper party may be added. Rule 10(2) confers a discretion upon the court to meet every case of defective parties. The necessary party is one without whom no order can be made effectively. In the absence of necessary party, the suit must fail. On the other hand, a proper party is a party in whose absence an effective order can be made but whose presence enables the court to decide the question involved in the proceedings finally and effectually. As observed by the Supreme Court in Shah Babulal Khimji, the trial Judge of the High Court with vast experience of various branches of law occupying the very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Any discretion exercised by the trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice one party or the other cannot be treated as a judgment. When an application for impleadment of the party in the suit is made before the trial Judge of the High Court, obviously, such application is considered by the trial Judge on the touch stone of Order 1 Rule 10 as to whether such party is a necessary or proper party in a suit. The trial Judge exercises his judicial discretion having regard to the facts and circumstances of the case. In our considered view, the order passed by the trial Judge of the High Court directing addition of the party, even if it be assumed that it may cause

some inconvenience or prejudice to the plaintiff cannot be held to be `judgment' for the purposes of clause 15 of the Letters Patent. Such order is neither intermediary nor interlocutory judgment as cataloged by the Supreme Court in the case of Shah Babulal Khimji. The order of addition of a party cannot be said to be causing substantial injustice nor is such order a matter of moment deciding directly valuable rights of the parties.

24. We, thus, hold that the order passed by the learned trial Judge for addition of respondent No.20 as party defendant is not a `judgment' under clause 15 of the Letters Patent and, therefore, not appealable. Appeal is dismissed accordingly.

(R.M.LODHA, J.)

(ANOOP V. MOHTA, J.)